No. 95-1330

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

In Re CLEVELAND TANKERS, INC., as owner and operator of the M/V "*Jupiter*," for exoneration from or limitation of liability.

AMERICAN STEAMSHIP COMPANY,

Petitioner,

vs.

CLEVELAND TANKERS, INCORPORATED; TOTAL PETROLEUM, INCORPORATED; FIREMAN'S FUND INSURANCE COMPANIES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TOTAL PETROLEUM, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should deny Petitioner American Steamship Company's request for a writ of certiorari on the issue of whether a maritime court must consider both culpability and causation in apportioning fault, where Petitioner raises this argument for the first time in this Court, where there is no conflict in the decisions of the United States courts of appeals regarding this issue, and where the opinion of the district court reflects that it considered both culpability and causation in making its factual determinations apportioning fault.

2. Whether this Court should deny Petitioner's request for a writ of certiorari where the admissibility of United States Coast Guard investigative reports to fix civil or criminal responsibility is barred by statute, and where the excluded portions of the U.S. Coast Guard Report contain opinions and conclusions of law rather than fact, and are accordingly inadmissible in evidence under Fed. R. Evid. 803(8)(c).

LIST OF PARTIES

The parties are Petitioner American Steamship Company and Respondents Cleveland Tankers, Inc., Total Petroleum, Inc., and Fireman's Fund Insurance Companies.

Respondent Total is a wholly owned subsidiary of Total Petroleum (North America) Ltd., whose shares are publicly owned.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. A) is reported at *In re Cleveland Tankers, Inc.*, 67 F.3d 1200 (6th Cir. 1995). The District Court for the Eastern District of Michigan's opinion on the merits (Pet. App. C) is unreported, and its opinion on the admissibility of the United States Coast Guard conclusions (Pet. App. E) is reported in *Matter of the Petition of Cleveland Tankers, Inc.*, 821 F. Supp. 463, 1993 A.M.C. 865 (E.D. Mich. 1992).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on October 19, 1995. A timely petition for rehearing was denied by order filed November 21, 1995 (Pet. App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

Article III, Sec. 2 of the Constitution of the United States provides, in part:

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction[.]

STATEMENT OF THE CASE

A. The Explosion Aboard The M/V JUPITER

This case, tried under the district court's admiralty and maritime jurisdiction, involved the resolution of a dispute among and between American Steamship Company, Cleveland

Tankers, Inc., and Total Petroleum, Inc., as to who bore legal liability for the consequences of a fire and explosion aboard the tankship M/V JUPITER, and how such liability should be allocated.

On September 16, 1990, the M/V JUPITER, a tankship owned by Cleveland Tankers and under voyage charter to Total, was moored at Total's marine transfer facility on the Saginaw River in Bay City, Michigan. Early that morning, the crew of the M/V JUPITER began unloading her cargo of unleaded gasoline to Total's shore facility by pumping it through a hose running from the ship to a pipeline on shore. The JUPITER's crew monitored the progress of the cargo transfer by means of "ullage pipes," openings from the deck to the hold that permitted the crew to gauge the contents of the tanks.

At approximately 3:00 a.m. on the morning of September 16, 1990, the IRVIN L. CLYMER, a Great Lakes bulk carrier with a length of 538 feet and a beam of 60 feet, passed the M/V JUPITER and headed downstream. (Pet. App. C, at 54a). The CLYMER passed at an estimated speed of 2 to 3 miles per hour, without causing any noticeable hydrodynamic forces. (Pet. App. C, at 54a). The M/V JUPITER officers who were watching the CLYMER testified that she passed safely and without any noticeable effect on the M/V JUPITER. (Pet. App. C, at 54a).

Later that morning, American Steamship's M/V BUFFALO, a laden ore carrier similar in size to the CLYMER, passed the M/V JUPITER, causing her to surge and break loose from her moorings. The aft (#4) mooring post broke, and the M/V JUPITER's stern swung out into the river, rupturing her discharge hose, spilling gasoline onto her deck and the Total dock. Fire ignited on the M/V JUPITER's deck and spread to her cargo tanks, resulting in a series of explosions. As a result of the fire and explosions, one seaman lost his life, eight seamen

sustained personal injuries, the M/V JUPITER and her cargo were total losses and Total's dock was heavily damaged. The M/V BUFFALO continued her passage and suffered no damage.

B. The Proceedings Below

After the incident, American Steamship and Cleveland Tankers filed separate petitions for limitation of, or exoneration from, liability pursuant to 46 U.S.C. § 183(a) (the "Limitation Act"). Personal injury, wrongful death and property damage claims were filed in the limitation proceedings, including a claim by Total for loss of its cargo and damage to its dock. Cleveland Tankers, American Steamship and Total filed claims for contribution against each other through a third-party complaint filed by Cleveland Tankers under Fed. R. Civ. P. 14(c) and cross-claims filed by Total and American Steamship Company pursuant to Fed. R. Civ. P. 13(g).

The district court conducted a 29-day, non-jury trial of the liability issues only, beginning on October 13, 1992 and concluding on December 22, 1992. On June 9, 1993, the district court issued a 92-page Memorandum Opinion and Judgment As To Liability Only, in which it extensively analyzed issues of negligence and causation. The district court found the M/V BUFFALO negligent in that it passed by the Total dock too closely; at an excessive rate of speed; in violation of its statutory duty to proceed carefully and prudently in order to avoid creating unusual swells or suction upon moored vessels. (Pet. App. C, at 34a-55a). The district court made a specific finding that the M/V BUFFALO'S negligence was a proximate cause of the casualty. (Pet. App. C, at 55a).

The district court also found that the M/V JUPITER was unseaworthy because the flame screens in her ullage pipes were ill-fitted, and that her crew was negligent for failing to close the caps on the ullage pipes prior to the M/V BUFFALO's passage.

(Pet. App. C, at 96a-109a). The district court found that the M/V JUPITER's negligence was a proximate cause of the accident. (Pet. App. C, at 96a-109a).

The district court also found that Total was negligent in failing to discover latent or hidden dry rot within the #4 kingpile and that such negligence was a proximate cause of the accident. (Pet. App. C, at 132a).

After finding the negligence of the M/V BUFFALO, the M/V JUPITER and Total each to be a proximate cause of the casualty, the district court apportioned fault among and between the parties based on principles of comparative fault. In apportioning fault, the district court made a factual finding that the negligence of the M/V BUFFALO was the primary cause of the incident, because it instigated the chain of events which caused the M/V JUPITER's breakaway and the resulting explosion. The district court summarized its finding as follows: "This Court finds that, because the BUFFALO passed the JUPITER both dangerously fast and dangerously close, hence instigating the entire chain of events, primary fault shall rest with the BUFFALO. *See Creole Shipping Ltd. v. Diamandis Pateras Ltd.*, 410 F. Supp. 313 (S.D. Ala. 1976), *aff'd*, 554 F.2d 1348 (5th Cir. 1977)." (Pet. App. C, at 133a).

In apportioning fault, the district court also made a factual finding that the M/V BUFFALO was the most culpable party. "This Court finds the conduct of the BUFFALO much more egregious than that of the JUPITER or Total Petroleum, Inc." (Pet. App. C, at 133a). Based on these factual determinations, the district court held American Steamship 50% at fault; Cleveland Tankers 25% at fault; and Total 25% at fault. (Pet. App. C, at 133a). The district court also denied American Steamship and Cleveland Tankers the right to limitation of liability, finding that the respective faults of their vessels were within their privity and knowledge. (Pet. App. C, at 133a).

American Steamship appealed to the Sixth Circuit the district court's finding that it was 50% responsible for the incident. American Steamship also appealed the district court's ruling that the ultimate findings and conclusions contained in a United States Coast Guard report of the incident were inadmissible in evidence.

Rejecting American Steamship's contention that the district court's allocation of fault was erroneous because the "subsequent negligence of Total and Cleveland Tankers radically changed the nature of the accident," the Sixth Circuit affirmed, holding that "[t]he district court's allocation of fault is not clearly erroneous."[1] (Pet. App. A, at 14a-15a). The Sixth Circuit noted the fact-intensive nature of the case, and found that the district court's findings of fact were well supported. (Pet. App. A, at 9a, 11a and 15a). The Sixth Circuit also affirmed the district court's exclusion of the ultimate findings and conclusions of the U.S. Coast Guard report. (Pet. App. A, at 15a-17a). After the Sixth Circuit denied rehearing, American Steamship filed the instant petition for writ of certiorari.

C. The Facts Supporting The Allocation Of Fault

Petitioner's statement of facts omits crucial evidence and findings of the district court concerning the M/V BUFFALO's speed, and the hydrodynamic forces she generated as she passed the M/V JUPITER. This is particularly significant in light of the fact that Petitioner is again attempting to raise in this Court the factual argument, rejected by the lower courts, that the district court's apportionment of fault was erroneous. While the facts

1. In considering American Steamship's arguments relating to the district court's apportionment of fault, the Sixth Circuit specifically noted that American Steamship was attempting to give preemptive weight to the testimony of its own witnesses which "at most simply conflicts with other evidence that the district court chose to believe." (Pet. App. A, at 13a).

which Petitioner chose to ignore are summarized in the district court's opinion, the most pertinent are highlighted below.

Although Petitioner makes passing reference to the observations of one eyewitness (whose photographs it includes in its appendix), it ignores the testimony of the other eyewitnesses. The district court's finding "that the M/V BUFFALO passed the Total dock at an excessive rate of speed, in violation of" the applicable statutes, ordinances and regulations is supported by the testimony of these eyewitnesses, who described the M/V BUFFALO's speed in such terms as "excessively fast"; "faster than I've ever seen any other vessel go through that bridge"; "unusually fast"; "extremely fast"; "awful fast"; "three, four, five times faster than most vessels." (Pet. App. C, at 23a and 37a-45a).

In addition to ignoring the above eyewitness testimony, Petitioner's Statement of Facts contains no reference as to how the M/V BUFFALO's speed was controlled or the speed at which the M/V BUFFALO claims it passed the M/V JUPITER. Although the testimony at trial established that the speed of the vessel can be correlated to the "pitch" setting of the BUFFALO's propeller blades, the captain of the M/V BUFFALO testified that he had "no idea" how to utilize the speed control program. (Pet. App. C, at 42a). He further testified that he was unable to equate pitch with speed and that he did not have a table of control settings for a representative range of speeds posted in the wheelhouse as required by the Navigation Safety Regulations, 33 C.F.R. 164.35(g)(4). (Pet. App. C, at 32a and 58a-62a). Although the captain of the M/V BUFFALO testified that when he came "around the blind corner" at the D & M Railroad Bridge and "up jumped the devil" (*i.e.*, the M/V JUPITER), he reduced the pitch from six to four feet (or from 4.9 to 2.5 miles per hour),[2]

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2. The M/V BUFFALO's captain at times gave inconsistent testimony to the effect that he saw the M/V JUPITER and reduced speed sooner than the D & M Bridge. (Pet. App. C, at 43a).

he further testified that it was a "fair statement" that he was not aware of the M/V JUPITER's presence in time to sufficiently check the M/V BUFFALO's speed. (Pet. App. C, at 43a).

While the M/V BUFFALO's crew claimed that, at the time of the incident, the ship was proceeding at approximately 2 or 3 miles per hour (Pet. App. C, at 42a), the testimony at trial based on the physical facts and principles of hydrodynamics repudiated that contention. American Steamship's statement of facts fails to inform this Court of the time and distance calculations of the M/V BUFFALO's speed made by Total's expert, Guy Meadows. Mr. Meadows calculated the speed of the M/V BUFFALO at the time of the incident to be between 6 and 9.2 miles per hour. (Pet. App. C, at 46a). This opinion was confirmed by the testimony of hydrodynamicist experts Professor J. Nicholas Newman and Professor Armin Troesch, both of whom, based upon the magnitude of the hydrodynamic forces generated during the incident, testified that the M/V BUFFALO was travelling at a rate of speed of between 6 and 9 miles per hour as she passed the M/V JUPITER.[3] (Pet. App. C, at 46a). Based on the testimony of these experts, the district court found that "the evidence presented shows that the BUFFALO passed by the JUPITER at a rate of speed somewhere between six and nine miles per hour," and that "[t]his rate of speed, in this Court's opinion, was excessive and unreasonable under the circumstances." (Pet. App. C, at 52a).

In addition to excessive speed, the district court faulted the M/V BUFFALO for passing the M/V JUPITER at an unreasonably close distance, a conclusion with ample evidentiary support. The hydrodynamists offered by Petitioner

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3. Petitioner's own hydrodynamicist expert, Professor Robert Beck, conceded that the speed of the M/V BUFFALO had to be greater than 4 miles per hour, and not the bare steerage alleged by the captain of the M/V BUFFALO. (Pet. App. C, at 49a-50a).

and Total agreed that the closer the moving vessel, the larger the forces. The captain of the M/V BUFFALO testified that the M/V BUFFALO passed the M/V JUPITER at a distance of 60 to 65 feet. (Pet. App. C, at 54a-55a). The district court concluded that this was an unreasonably close distance based on evidence that six hours earlier, the M/V JUPITER was passed without incident by the CLYMER, which was similar in size to the M/V BUFFALO, at a distance of 70 to 80 feet.[4] (Pet. App. C, at 54a-55a).

Finally, Petitioner's statement of facts emphasizes that the district court found the #4 kingpile to be 90% - 95% decayed. It makes no reference, however, to the uncontradicted evidence that the #4 kingpost withstood at least 18,000 pounds of force twice, without incident, when the M/V JUPITER was originally tied up in the early morning hours of September 16, 1990, and when the mooring lines were adjusted by the M/V JUPITER's first mate twice within a few hours of the accident. (Pet. App. C, at 76a).

Thus, Petitioner's factual arguments are contradicted by the extrinsic evidence based upon physical facts and the laws of hydrodynamics concerning the speed of the M/V BUFFALO. The district court's findings of fact, and the Sixth Circuit's affirmance of those findings, are based upon coherent and factually plausible testimony of eyewitnesses which is consistent with and supported by the extrinsic physical and expert testimony.

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4. The CLYMER's passage was also cited by the district court as evidence that the M/V BUFFALO's speed was excessive. The district court noted that it took 25-30 minutes for the CLYMER to pass, which equates to 2-3 mph. (Pet. App. C, at 54a). Professor Meadows calculated that it took the M/V BUFFALO 4-5 minutes to pass, which equates to a speed of 7.3-8.1 mph. (Pet. App. C, at 46a).

REASONS FOR DENYING THE WRIT

A review on writ of certiorari is not a matter of right, but of judicial discretion. Sup. Ct. R. 10 provides in pertinent part that "[a] petition for writ of certiorari will be granted only when there are special and important reasons therefor." This Court has held that "[t]he jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

Based on this standard, Petitioner's request for certiorari should be denied. Although Petitioner has attempted to fashion a purported split of legal authority on the issues of whether: (i) a maritime court apportioning fault under the doctrine of comparative fault must consider issues of both culpability and causation; and (ii) the ultimate findings and conclusions contained in a U.S. Coast Guard investigative report are admissible in evidence, the claimed conflicts in decisions of the United States court of appeals are illusory.[5] The instant petition for certiorari is nothing more than a thinly veiled attempt to challenge again the factual findings of the district court, and this is not the proper forum in which to do so. Although Petitioner may disagree with the factual findings of the district court, this is not a sufficient reason to grant certiorari.

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5. In order to obtain a writ of certiorari, Petitioner must establish that "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter." Sup. Ct. R. 10.1(a).

I.

THIS COURT SHOULD DENY PETITIONER'S REQUEST FOR CERTIORARI ON THE QUESTION OF WHETHER THE APPORTIONMENT OF "FAULT" ENCOMPASSES CONSIDERATIONS OF BOTH CULPABILITY AND CAUSATIVE POTENCY.

A. Petitioner Has Never Before Argued That Causative Potency Should Be Considered In Apportioning Fault, And, Even If It Had, Petitioner Has Failed To Establish That There Is A Conflict Among The United States Courts Of Appeals Regarding The Role Which Causation Plays In The Apportionment Of Fault.

Petitioner is raising for the first time the argument that a maritime court is required to consider causative potency when apportioning fault under the comparative fault doctrine enunciated by this Court in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).[6] At the district court level, Petitioner

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6. In *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), this Court rejected the historic "divided damages rule," where damages were divided equally between or among negligent vessels regardless of the degree of fault attributable to each, and replaced it with a system of "comparative fault." *Id.* at 411. In adopting a comparative fault standard for apportioning damages, the Court stated that:

> [W]hen two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only ... when it is not possible fairly to measure the comparative degree of their fault.

(Cont'd)

alleged that it should not be apportioned any percentage of fault because the conduct of Total and the M/V JUPITER was more egregious (or more blameworthy) than the conduct of the M/V BUFFALO. (R. 357, R.370). Thus, at the district court level, Petitioner claimed that the apportionment of fault should be based solely on the relative culpability of the parties. Because Petitioner never argued that the district court should apportion fault based on causative potency, the issue is not properly before this Court.

Assuming, *arguendo*, that Petitioner's causation argument is ripe for review, Petitioner has failed to identify any relevant conflict in the state of the law regarding proportional fault analysis. Certiorari, therefore, should be denied.

Petitioner attempts to construct a split of authority on the purely academic question of whether a court apportioning damages under the doctrine of comparative fault must give separate consideration to differences in proximate cause, or "causative potency."[7] The only purported legal conflict identified by Petitioner, however, relates to the question of whether the doctrine of *superseding cause* as a *defense* survives this Court's adoption of a comparative fault rule in *United States v. Reliable Transfer.* Petitioner claims that the Eighth and Fifth Circuits hold that the doctrine of superseding cause continues to

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(Cont'd)
Id. at 411. Thus, after *Reliable Transfer,* once causation is found, the apportionment of damages is to be made on the basis of comparative fault rather than by equal contribution.

7. Indeed, Petitioner's "causative potency" argument is lifted from a law review article, John F. Meadows & George J. Markulis, *Apportioning Fault in Collision Cases,* 1 U.S.F. Mar. L. J. 1, 31 (1989). Petitioner fails to mention, however, that the conclusion of the authors was that the application of the doctrine of "causative potency" in apportioning fault is unworkable, and that culpability should be used as the sole basis for determining relative degrees of fault.

apply in a proportional fault setting, while the Eleventh Circuit has ruled that it does not. (Petition, at 11). Aside from the fact that Petitioner's contention is incorrect,[8] Petitioner fails to explain how this alleged legal conflict is relevant in this case. Petitioner has never raised superseding cause as a defense and, in fact, specifically has disavowed reliance upon this doctrine. (Petition, at 14; Pet. App. A, at 14a).

Given the absence of a superseding cause defense, this Court should reject Petitioner's attempt to align this case with *Exxon v. Sofec, Inc.*, 54 F.3d 570 (9th Cir.), *cert. granted*, __ U.S. __, 116 S. Ct. 493 (1995). In that case, the Exxon plaintiffs brought suit seeking damages for the loss of a tanker, the HOUSTON, the costs of oil spill cleanup and the loss of cargo. The district court held that failure of a Single Point Mooring System ("SPM") manufactured by the defendant Sofec was a cause in fact of the loss, but that the negligence of the Exxon plaintiffs superseded any damage caused by this failure, and was the sole proximate cause of the HOUSTON's stranding. The issue before the Ninth Circuit was whether, after this Court's decision in *United States v. Reliable Transfer*, the district court properly found that a superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases, *i.e.*, whether a party to a maritime action may be exonerated from liability because of a superseding cause. The Ninth Circuit affirmed, holding that:

> Where, as here, the district court finds the injured party to be the superseding or *sole*

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8. As recognized by the Ninth Circuit in *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir.), *cert. granted*, __U.S. __, 116 S. Ct. 493 (1995), given that the Eleventh Circuit in *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), "explicitly ruled that the appellee's underlying actions were a proximate cause (as well as a cause in fact) of the damage, it is plausible that the court would not have ruled out a defense based on superseding cause as the sole proximate cause of the damage." *Id.* at 574.

> proximate cause of the damage complained of, it cannot recover from a party whose actions or omissions are deemed to be causes in fact, but not legal causes of the damage, regardless of whether that party's liability is premised on negligence or strict liability. *See* Restatement (Second) of Torts § 440 cmt. b (1965) ('superseding cause relieves the actor of liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about harm'); and *see In re Related Asbestos Cases*, 543 F. Supp. 1142, 1150 (N.D. Cal. 1982) (holding the defense of superseding cause applicable in cases of strict liability in tort).

Id. at 576 (emphasis on original).

Unlike the *Exxon* case, where the issue under consideration was whether the district court appropriately determined that the conduct of one of the parties was a superseding cause and sole cause of the casualty, in the case *sub judice*, no superseding cause defense was raised. The negligence of each of the parties in this case was found by the district court to be a proximate cause of the accident. Principles relating to apportionment of fault will remain unaffected by this Court's ultimate treatment of the *Exxon* case.[9]

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9. Petitioner's contention that causation must be considered separately in apportioning fault is without legal support. Courts have consistently used culpability or blameworthiness as the standard by which to determine fault in comparative fault cases. *Alaska Packers Ass'n, Inc. v. O/S EAST POINT*, 421 F. Supp. 48, 53 AMC 228 (W.D. Wash. 1976) (a collision case in which the district court used *culpability* as the barometer for apportioning fault); *Afran Transp. Co. v. S/T MARIA VENIZELOS*, 450 F. Supp. 621 (E.D. Pa. 1978) (the culpability standard was used to apportion fault); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 402 F. Supp. 1187 (W.D. Wash. 1975), *vacated*

(Cont'd)

B. There Is No Basis For Petitioner's Contention That The District Court Did Not Separately Consider Causation In Making Its Factual Determinations Regarding Fault, And Petitioner Should Not Be Permitted To Use This Forum To Mount A Collateral Attack On The Factual Findings Of The District Court.

There is no basis for Petitioner's contention that the district court failed to consider causation in apportioning fault. Although Petitioner argues that "the [district] court proceeded to the apportionment inquiry leaving the element of causative potency behind," (Petition, at 12), the district court's opinion belies this claim. (Pet. App. C).

After making specific findings that the M/V BUFFALO, the M/V JUPITER and Total each engaged in negligent conduct which was a proximate cause of the incident, the district court considered both the nature of the conduct of the parties and the causal connection between that conduct and the harm caused. First, the district court considered the extent to which each of the parties caused or contributed to the incident. In this regard, the district court concluded that the M/V BUFFALO was the primary cause of the incident: "This Court finds that, because the BUFFALO passed the JUPITER both dangerously fast and dangerously close, hence instigating the entire chain of events, primary fault shall rest with the BUFFALO." (Pet. App. C, at 133a). The district court then considered the relative culpability of the parties, finding the M/V BUFFALO to be most

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(Cont'd)

on other grounds, 565 F.2d 1129, 1140 (9th Cir. 1977) (in holding the defendant responsible for only one-third of the damages, the court stated "[c]ulpability, not causation, is the standard by which damages are assessed in comparative negligence cases." *Id.* at 1188); *Hercules Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985) (standing for the proposition that apportionment is a question of culpability).

blameworthy. "This Court finds the conduct of the BUFFALO much more egregious than that of the JUPITER or Total Petroleum, Inc." (Pet. App. C, at 133a). Thus, the district court has undertaken the very analysis which Petitioner claims it did not.

Although Petitioner recognizes that "this Court does not sit as an error correcting court," (Petition, at 25), the instant petition is nothing more than a disguised collateral attack on the district court's factual findings and the Sixth Circuit's affirmance of those findings. This Court should not permit Petitioner to take advantage of this forum by mounting yet another attack on the factual findings regarding causation, in the guise of arguing that there is split of legal authority which warrants this Court's review.

The essence of Petitioner's argument is that the district court erred in finding the M/V BUFFALO to be a proximate cause of the casualty and 50% at fault. For example, Petitioner argues that "[t]he JUPITER crew's failure to close ullage pipes in preparation for a vessel passage in case of fire was negligence of overriding causal significance," (Petition, at 17), and that "the assignment of twice as much fault to the BUFFALO fails to reflect the paramount causal significance of the JUPITER's role in converting the occurrence into an explosive catastrophe and of Total Petroleum's role in maintaining an ineffective mooring post to permit the accident from occurring at all." (Petition, at 16). The district court rejected Petitioner's factual argument that the conduct of the M/V JUPITER and Total was of overriding causal significance, finding that the M/V BUFFALO "instigated" the entire chain of events which led to the explosion. These factual findings were affirmed by the Sixth Circuit, and Petitioner cannot again challenge those findings in this forum.[10]

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10. The district court's apportionment of fault in this case is, in fact, (Cont'd)

Assuming, *arguendo*, that Petitioner may attack in this Court the district court's factual findings, there is ample basis in the record to support the lower court's findings. The district court's conclusion that the M/V BUFFALO's conduct was much more egregious than that of Total is not only plausible, it is compelled by the evidence that the M/V BUFFALO was mishandled and operated with poor seamanship. The district court found that the M/V BUFFALO's speed was between 6 mph and 9 mph, or at least three to four times greater than was reasonable, based upon the uncontroverted testimony of all three hydrodynamicists — including Petitioner's own expert. In addition to excessive speed, the district court faulted the M/V BUFFALO for passing the M/V JUPITER at an unreasonably close distance, a conclusion with ample evidentiary support.

(Cont'd)
more favorable to Petitioner than other reported cases involving surging incidents, even where, as here, the courts found the moored vessel to be partially at fault. For example in *Creole Shipping Ltd. v. Diamandis Pateras, Ltd.*, 410 F. Supp. 313, 316-19 (S.D. Ala. 1976), the court found the passing vessel to be 66-2/3% at fault and the improperly moored vessel 33-1/3% at fault. In *New Orleans S.B. Co. v. M/T HELLESPONT GLORY,* 562 F. Supp. 391, 392 (E.D. La. 1983), the court found the passing vessel to be 75% at fault and the moored vessel to be only 25% at fault. Here, the apportionment of fault by the district court to the passing vessel is more favorable than Total submits is justified by the facts of the case.

Petitioner attempts to distinguish *Creole Shipping* as fundamentally different from the case at hand. If anything, however, the case at hand presents an even more compelling situation for allocating a much greater degree of fault to the moving vessel. In *Creole Shipping*, the evidence established that the passing vessel was at least moving at bare steerageway, but that did not absolve the moving vessel from negligence. Here, the evidence conclusively established that the M/V BUFFALO was traveling three to four times bare steerageway and by doing so increased the hydrodynamic forces by a factor of *nine*. (Pet. App. C, at 48a).

The evidence further supports the district court's allocation of a lesser percentage of fault to Total. In its proposed findings, American Steamship submitted a scattergun 21 allegations of fault against Total. (R. 357, R. 370). The only allegation of fault accepted by the district court was that the condition of the #4 kingpiling was a proximate cause of the accident. Finding as credible the testimony of Leonard Van Houten, Total's dock expert, the district court held that (except for the condition of the #4 kingpile which contained a latent defect), Total provided a safe berth for the M/V JUPITER. (Pet. App. C, at 71a).

In apportioning fault, the district court gave appropriate consideration to the "egregious" conduct of the M/V BUFFALO when compared to the significantly lesser fault found on the part of Total. The only fault attributed to Total by the trial court was the failure to have a more extensive inspection program which *may* have discovered a latent, hidden condition. Total respectfully submits that, if any court were to make a factual determination as to a reallocation of fault, a higher percentage of fault should be attributed to Petitioner and a lesser degree of fault to Total.

II.

THIS COURT SHOULD DENY PETITIONER'S REQUEST FOR CERTIORARI ON THE QUESTION OF WHETHER THE CONCLUSIONS CONTAINED IN A U.S. COAST GUARD REPORT ARE ADMISSIBLE IN EVIDENCE.

At trial, Cleveland Tankers and Total stipulated to the admission of the factual findings prepared by the National Transportation Safety Board and the U.S. Coast Guard, but objected to the admissibility of the opinions and legal conclusions contained in both reports. On December 10, 1992,

the district court entered an Opinion and Order Denying Admissibility Of The Conclusions Contained In The NTSB and USCG reports. (Pet. App. E). In affirming the district court's ruling, the Sixth Circuit found persuasive the reasoning of the Ninth Circuit in *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988).

Petitioner has not shown the existence of a conflict between decisions of the United States courts of appeals which would justify this Court's intervention regarding the admissibility of conclusions contained in Coast Guard reports. Certiorari therefore should be denied.

A. The Use Of U.S. Coast Guard Investigative Reports To Fix Civil Or Criminal Responsibility Is Barred By Regulation Authorized By Act Of Congress.

Pursuant to enabling statutory authority (14 U.S.C. § 2; 46 U.S.C. § 6301), the Coast Guard has promulgated rules and regulations concerning its investigations and limitations on the use thereof. 46 C.F.R. § 4.07-1(b) (1986) which provides:

> The investigations of marine casualties and accidents and the determinations made are for the purpose of taking appropriate measures for promoting safety of life and property at sea, *and are not intended to fix civil or criminal responsibility.*

(Emphasis supplied).

46 C.F.R. § 4.07-1(c) essentially mirrors 46 U.S.C. § 6301 which requires that the investigation attempt to decide (a) the cause of the accident; (b) whether there is evidence that any failure of material contributed to the casualty; (3) whether there

is evidence that there is any negligence on the part of licensed personnel which contributed to the accident; (4) whether there is evidence that any Coast Guard personnel contributed to the casualty.

Notwithstanding the provisions of 46 C.F.R. § 4.07-1(b), Petitioner urged the admission into evidence of these opinions or conclusions of law for the express purpose of influencing the district court's decision to "fix" the civil liability of the parties to this case. The district court was correct in refusing to do so.[11]

In refusing to admit such portions of the report in the instant case, both the district court and the Sixth Circuit properly relied upon *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988), where

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11. Assuming, *arguendo*, that the exclusion of the conclusions contained in the report was error, it was harmless. The district court made a specific finding that the conclusions and opinions contained in the U.S. Coast Guard report would not have assisted it in deciding this case:

> Even if the admissibility was not precluded for the reasons indicated in this opinion, this Court does not believe that such conclusions and opinions would assist the trier of fact in making the decisions which this Court is required to make. This Court has been presented with extensive testimony as to the facts and circumstances surrounding the incident of September 16, 1990, which is the subject matter of this lawsuit. This Court, as trier of fact, believes that it is capable of making a determination as to fault, responsibility, or limitation, based on the evidence admissible under the Federal Rules of Evidence, and someone else's conclusions based on the information presented to him or her would not, in this Court's opinion, be helpful to this Court.

(Pet. App. E, at 146a).

the court held that the district court committed reversible error by admitting into evidence the evaluative portions of a Coast Guard report. In *Huber,* the party urging admissibility made the same argument that Petitioner makes here, *i.e.*, that the regulation (46 C.F.R. § 4.07-1(b) does not limit the admissibility of the report, but rather describes the purpose for which the investigations are conducted. The court in *Huber* rejected that argument out of hand, stating:

> Monterey Navigation suggests that the regulation does not limit the admissibility of investigation reports, but rather simply announces the purposes for which the investigations are conducted. *Given the express language of the regulation quoted above, we find this position to be untenable.*

838 F.2d at 402, n. 4 (emphasis supplied).

The *Huber* court, after taking note of 46 C.F.R. § 4.07-1(b), further held that:

> Thus, for the same reasons that Congress has prohibited use in private litigation of accident investigative reports prepared by the National Transportation Safety Board and other federal agencies, we hold that under 46 C.F.R. § 4.07-1(b), the Coast Guard investigating officers' conclusions and recommendations in the reports are inadmissible as evidence in this private litigation arising out of the accident that was the subject of the reports. That all or part of the reports might, in the absence of a statute or regulation such as this, be admissible

> under Fed. R. Evid. 801(d)(2) or some other rule is immaterial. Congress may impose limitations on the admissibility of evidence beyond those provided in the Federal Rules of Evidence.

Id. at 402-403. *See also, Strehle v United States*, 860 F. Supp. 136, 138 (S.D.N.Y. 1994); *In re Complaint of American Export Lines, Inc.*, 73 F.R.D. 454 (S.D.N.Y. 1977); *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). *Davis v. Cessna Aircraft Corp.*, 182 Ariz. 26, 893 P.2d 26 (App. 1994); *Yap v. Controlled Parasailing of Honolulu, Inc.*, 76 Haw. 248, 873 P.2d 1321 (1994); *Haggerty v. Moran Towing & Transp. Co.*, 162 A.D. 2d 189, 556 N.Y.S. 2d 314 (1990).

Both the district court and the Sixth Court properly concluded that Petitioner's reliance upon *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), was misplaced. The district court properly distinguished *Beech Aircraft* from the instant situation, noting that *Beech* dealt with the admissibility of a judge advocate general report under Fed. R. Evid. 803 and that no congressional act or administrative regulation bars the admissibility of JAG reports in civil proceedings. (Pet. App. E). The Sixth Circuit specifically referred to this same distinction in affirming the district court. (Pet. App. A).

Although Petitioner argues that other courts have admitted the conclusions contained within Coast Guard reports, despite the existence of 46 C.F.R. § 4.07-1(b), none of the decisions of the United States courts of appeals cited by Petitioner analyzed the admissibility in light of the Coast Guard regulation at issue in this case.[12] Petitioner offers no convincing reason why this Court should grant certiorari.

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12. Petitioner also contends that the Sixth Circuit erred in light of Fed. (Cont'd)

B. The Excluded Portions Of The U.S. Coast Guard Report Contain Opinions And Conclusions Of Law Rather Than Fact, And Are Accordingly Inadmissible In Evidence Under Rule 803(8)(C).

The excluded portions of the Coast Guard report also are not admissible under Rule 803(8)(C). Although Rule 803(8)(C) carves out a limited exception to the hearsay rule for the factual findings of a report such as a U.S. Coast Guard report, this exception does not extend to the opinions and legal conclusions contained therein.

In *Haggerty v. Moran Towing & Transp. Co.*, 162 A.D. 2d 189, 556 N.Y.S. 2d 314 (1990), a New York appellate court held that the kinds of opinions and conclusions contained in the evaluative sections of a Coast Guard report were legal conclusions and not admissible. In *Haggerty*, the defendant

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R. Evid. 402 which states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Petitioner errs by concluding that this evidence is therefore admissible despite the existence of 46 C.F.R. § 4.07-1(b). In so doing, Petitioner ignores that this provision was created pursuant to the Coast Guard's statutorily-authorized power to issue regulations regarding its investigations and the limitations on their use.

Further, Petitioner cites two appellate court cases for the proposition that, despite clear statutory authority directing otherwise, significant portions of NTSB reports have been admitted into evidence. *See Protectus Alpha Navigation Co. v. North Pacific Grain Growers*, 767 F.2d 1379 (9th Cir. 1985); *Keen v. Detroit Diesel Allison*, 569 F.2d 547 (10th Cir. 1978). These cases are of no assistance to Petitioner. In both, the courts specifically held that these reports were excludable, pursuant to statute, "to the extent they express agency views or conclusions as to the probable cause of the accident. . . . " *Protectus*, 767 F.2d at 1385.

argued that the trial court erred in excluding from evidence a Coast Guard investigative report which found that there was "no evidence of actionable misconduct, inattention to duty, negligence, or willful violation of law or regulation" on the part of the defendant or its agents. The *Haggerty* court, relying upon *Beech Aircraft*, held that the exclusion of the investigative report was proper:

> Rule 803(8)(C) of the Federal Rules of Evidence provides for admissibility, in civil actions, of 'factual findings resulting from an investigation made pursuant to authority granted by law.' Fact findings, including reasonable inferences drawn from the evidence made by the Coast Guard following its investigation, are admissible in evidence. *However, portions of the Coast Guard report herein, which state that no evidence was found of 'actionable misconduct, inattention to duty, negligence, or willful violation of law or regulation,' state legal conclusions, not factual findings, and as such are inadmissible under Rule 803(8)(C).*

Haggerty, 556 N.Y.S. 2d at 316 (citations omitted) (emphasis added).

The Arizona Court of Appeals echoed this conclusion in *Davis v. Cessna Aircraft Corp.*, 182 Ariz. 26, 893 P.2d 26 (App. 1994). There, the court excluded the probable cause conclusion language contained in an NTSB report under Arizona's codification of Rule 803(8)(C). Citing to *Huber*, the court stated that the rule did not "provide for the admission of a government agency's conclusions." 893 P.2d at 36. The decisions of the district court and Sixth Circuit therefore are consistent with the reasoning of *Huber*, *Davis* and *Haggerty*.

CONCLUSION

There are no special and important reasons for granting certiorari in this case. Certiorari should be denied on the issue of whether a maritime court must consider both causation and culpability in apportioning fault because Petitioner never raised this argument at the district court level. Assuming, *arguendo*, that Petitioner's argument is ripe for review, Petitioner has identified no relevant conflict in the decisions of the United States courts of appeals which would warrant this Court's intervention. Moreover, the opinion of the district court reflects that it weighed both the nature of the conduct of the parties and the causal connection between that conduct and the harm caused in making its allocation of fault, and the Sixth Circuit affirmed the district court's findings, Petitioner should not be permitted to use this forum to mount yet another attack on those findings. Certiorari similarly should be denied on the issue of whether the ultimate findings and conclusions in a United States Coast Guard report are admissible, because the use of those findings to fix civil or criminal responsibility is barred by statute, and the excluded portions of the reports contain opinions and conclusions of law rather than fact and are inadmissible in evidence under Rule 803(8)(C).

For all the foregoing reasons, Respondent Total Petroleum, Inc., respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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